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Filed : February 9, 2004

REMARKS

By this paper, Applicant has amended Claim 1. Support for the amendment to Claim 1 can be found at least in paragraph 0040 of the specification, as well as in Figures 1-5. Applicant respectfully submits that no new matter has been added by this amendment, nor does this amendment raise new issues.

Rejection of Claims Under 35 U.S.C. § 103(a)

The Examiner has rejected Claims 1-9 under 35 U.S.C. § 103(a) as unpatentable over U.S. Patent No. 5,950,856 to Cinque in view of U.S. Patent No. 5,119,967 to Ercolani, U.S. Patent No. 3,991,879 to Hirota, and U.S. Patent No. 5,325,991 to Williams. In addition to the arguments previously presented, the Examiner has also stated, with respect to the newly cited Hirota reference, that:

Hirota teaches a bottle and can crate wherein L-shaped brackets 9, 11, 12 are supported at a top by a perimeter opening and supported at the bottom by a circular ring, the lower horizontally extending tip of the L-shaped supports extend less than halfway across the opening. There are four L-shaped brackets for each bottle or can retaining opening or space.

The Examiner has also maintained the previous rejection of Claim 10 in view of U.S. Patent No. 3,027,826 to Morris. For the reasons set forth below, Applicant respectfully submits that Claims 1-10 are patentable over any combination of the cited prior art.

By this paper, Applicant has amended Claim 1 to clarify a structural distinction between the present claims and the prior art. In particular, Claim 1, as amended, recites a refreshment center comprising a second end having a circular hole therein for receiving and holding a beverage container, the second end further comprising at least one L-shaped prong for supporting the bottom of a beverage container, connected to and extending downward from the second end, the L-shaped prong comprising a bottom tip which extends less than halfway into the cylindrical space defined by the circular hole, wherein said L-shaped prong is not connected at the bottom tip to another component of the refreshment center.

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Applicant notes initially that such a feature is not taught by the previously cited prior art for the reasons discussed in Applicant's previous response. In addition, Applicant notes that the Examiner discussion of the newly cited Hirota reference is the only discussion of the feature of the L-shaped prong comprising a bottom tip which extends less than halfway into the cylindrical space defined by the circular hole.

For the reasons discussed below, Applicant respectfully submits that the feature of amended Claim 1 of an L-shaped prong comprising a bottom tip which extends less than halfway into the cylindrical space defined by the circular hole, wherein said L-shaped prong is not connected at the bottom tip to another component of the refreshment center, is not taught or suggested by the cited prior art.

In particular, Applicant notes that Hirota teaches an integrally formed bottle receiving compartment comprising vertical members 9, 11, 12, each of which are connected at their bottom end to the to an annular bottom plate 10. The annular plate is thus configured to contact the base of a bottle and retain the bottle in place. Hirota does not teach an L-shaped prong as recited in amended Claim 1, wherein the L-shaped prong is not connected at the bottom tip to another component of the refreshment center.

Furthermore, Applicant respectfully submits that it there would not have been a reason to combine the teachings of Hirota with the teachings of Cinique, for the same reasons previously discussed with respect to Ercolani and Williams. As previously noted, each of Hirota, Ercolani, and Williams is directed to a device which retains a container by providing a member configured to contact the base of the container to prevent the base of the retainer from moving downward beyond the retaining member. The Cinque device securely retains a stemmed or tapered glass in place through constant contact with the sides of the device. This constant contact is facilitated by permitting the retained glass to slide downward as far as necessary.

The inclusion of the supporting member of Hirota would drastically alter the operation of the Cinque device. Retained glasses would be supported by the annular plate, and need not be in constant contact with the sides of the cup holder portion. For top-heavy glasses, and in particular stemmed glasses, the sides of the cup holder portion would provide no support, and the glass would be very likely to fall out of the cup holder portion when the device was tipped. As the principle of operation of the device would be significantly altered, and the functionality of the

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device would be impaired to the point that the device would no longer be suitable for the retention of stemmed glasses, Applicant respectfully submits that it there would have been no reason to modify the device of Cinque in view of the teachings of Hirota.

For at least the reasons discussed above, Applicant respectfully submits that Claim 1, as amended, is not taught or suggested by any combination of the cited art. As Claims 2-10 depend from independent Claim 1, Applicant submits that they are also patentable for at least the reasons discussed with respect to Claim 1, as well as providing additional patentable distinctions. Thus, Applicant submits that each of Claims 1-10 are patentable over the cited prior art, and requests the withdrawal of the rejections of the same.

Non-Statutory Double Patenting Rejection of Claims 1-10

The Examiner has also maintained the rejection of Claims 1-10 on the grounds of nonstatutory obviousness-type double patenting as unpatentable over Claims 1-4 of U.S. Patent No. 6,702,141 to Cinque in view of Williams, Davis and Morris. Applicant again notes that Claims 1-10 are based on claims originally filed in the patent application which issued as the '141 patent, and that the present application was filed as a result of that restriction requirement. Under 35 U.S.C. 121, the use of the parent '141 patent in a double patenting rejection is inappropriate except in situations such as those set forth in M.P.E.P. § 804.01.

In response to Applicant's arguments with respect to the inappropriateness of the rejection, the Examiner has merely stated that "Re double patenting rejection, application 10/370,273 was not available to be evaluated as to why restriction done and what type of restriction was made. The double patenting rejection is deemed proper."

Applicant notes that the Examiner has indicated that the file history of the '141 patent was unavailable. For the Examiner's convenience, a copy of the restriction requirement from the '141 patent is attached. If there are any portions of the file history of the '141 patent which would be helpful in evaluating the restriction requirement, the Examiner is respectfully invited to contact Applicant's representative to request those portions.

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Statutory Double Patenting Rejection of Claims 1-9

The Examiner has rejected Claims 1-9 under 35 U.S.C. 101 as claiming the same invention as that of Claims 1-4 of prior U.S. Patent No. 6,702,141 to Cinique. Applicant respectfully submits that a statutory double patenting rejection is not appropriate in this situation.

The MPEP states that “a reliable test for double patenting under 35 U.S.C. 101 is whether a claim in the application couple be literally infringed without literally infringing a corresponding claim in the issued patent. *In re Vogel*, 422 F.2d 438, 164 USPQ 619(CCPA 1970)” *M.P.E.P. § 804(II)(A)* As the claims of the ‘141 patent recite multiple limitations not recited by the pending claims, and vice versa, Applicant respectfully submits that the scope of the claims is different, and that a statutory double patenting rejection is inappropriate.

In addition, Applicant respectfully submits that the use of the ‘141 patent in a double patenting rejection is barred by 35 U.S.C. 121, as discussed above.

Conclusion

For at least the above reasons, Applicant respectfully submits that all of the rejections have been addressed, and that Claims 1-10 are now in condition for allowance. Applicant respectfully requests the withdrawal of all pending rejections and the allowance of Claims 1-10

In addition, although the present communication may include alterations to the application or claims, or characterizations of claim scope or referenced art, the Applicants are not conceding in this application that previously pending claims are not patentable over the cited references. Rather, any alterations or characterizations are being made to facilitate expeditious prosecution of this application. The Applicants reserve the right to pursue at a later date any previously pending or other broader or narrower claims that capture any subject matter supported by the present disclosure, including subject matter found to be specifically disclaimed herein or by any prior prosecution. Accordingly, reviewers of this or any parent, child or related prosecution history shall not reasonably infer that the Applicants have made any disclaimers or disavowals of any subject matter supported by the present application


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Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

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